IN THE

Supreme Court of the United States

October Term, 1967

No. 645

JOSEPH LEE JONES and BARBARA JO JONES,
Petitioners,

v.

ALFRED H. MAYER COMPANY, a corporation, ALFRED REALTY COMPANY, a corporation, PADDOCK COUNTRY CLUB, INC., and ALFRED H. MAYER, an individual, and an officer of the above corporations,
Respondents.

BRIEF *AMICI CURIAE* BY THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE UNITED STATES OF AMERICA, AND BY THE METROPOLITAN CHURCH FEDERATION OF GREATER ST. LOUIS

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All parties to the case have given written consent to the filing of this brief.

The interest of the *amici* is the direct consequence of the nature of their own commitments and of the issue here involved.

The National Council is a membership corporation incorporated in 1950 under the Membership Corporations Law of New York. It is the co-operative agency of thirty-four Protestant and Orthodox religious denominations with an aggregate membership of 42,000,000 throughout the United States. By its certificate of incorporation it is committed "to promote the application of the law of Christ in every relation of life."

The Metropolitan Church Federation is a Missouri corporation of a similar nature and purpose. It is officially committed "to pray and work for the elimination of segregation and discrimination in every respect of our common life."

In November, 1953, the National Council's General Board (the governing body) adopted "A Statement on the Churches' Concern for Housing." It included the following:

> "We appeal to all church members to support every sound and reasonable effort to put an end to the exclusion of any person on account of race, color, creed, or national origin or ancestry from equal opportunity to rent or purchase living accommodations with all available facilities and services at equitable cost in any neighborhood."

This Statement has continued to express the National Council's "Concern for Housing"—a concern shared by the Metropolitan Church Federation. Obviously it relates itself to the heart of:

The Question Here Involved

> Is the concerted "general policy" of the defendants, adopted for financial profit to themselves, in excluding Negroes from purchasing homes in their community developments of 2700 families, actionable by the excluded plaintiffs under the Constitution and laws of the United States?

Since the complaint was dismissed for failure to state a cause of action, the facts pleaded present this question as one of law.

The determinations below are reported in 255 F. Supp. 115, affirmed 379 F. 2d 33.

Statutes

The pertinent constitutional provisions and Federal statutes will, we are informed, be quoted in the appellants' brief.

In Appendix A hereto we quote certain provisions of the Missouri Constitution and statu deemed to be pertinent.

The Facts

The cause of action is pleaded with full factuality.

The essence is that the three corporate defendants and the defendant Mayer (sued individually and as an officer) have concerted a "general policy" of refusing to sell to Negroes houses and lots in the communities for the housing

of 2700 families which the defendants are establishing and operating in the County of St. Louis. The plaintiffs are husband and wife employed by the Veteran's Administration. When they sought to purchase a lot and home offered in the defendants' brochure and newspaper advertisement, they were refused solely because the husband was a Negro and because the "general policy" of the defendants is not to sell to Negroes.

The corporate defendants are Missouri corporations. Alfred H. Mayer Company is the developing and construction company. Alfred Realty Corporation is the real estate dealer licensed by the Missouri Real Estate Commission. Paddock Country Club, Inc., is the operator of the golf course, tennis courts and bath facilities for the residents of the community, named "Paddock Woods." The defendant Mayer serves as managing officer and the guiding policy maker of these corporations. The financing for the corporations and the purchasers of the homes is provided by Mercantile Mortgage Company, a Missouri corporation.

Paragraphs 7 and 8 of the complaint list the various ways in which the State of Missouri and its agencies have involvements and participations necessary to the creation, maintenance, operation, government and success of the defendants' developments.

ARGUMENT

POINT ONE

The decisions below zero in upon today's central issue of constitutional and statutory equality in citizenship.

The complaint states a cause of action:

(1) Because the defendants' concerted and declared "general policy" for their vast quasi-municipality denies to the plaintiffs their personal rights as citizens under the Constitution and laws of the United States; and also

(2) Because state actions, governmental functionings and expenditures are involved in the creation and viability of this huge racially segregated quasi-municipality operated by the defendants with profiting by racism.

We submit that the decisions below provide an open door for exclaves in our American society of vast quasi-municipalities built on the exploitation of racism and discrimination for profit.

What has been done here at the expense of the civil rights of Negroes can equally be done at the expense of citizens of other national origins or of religious groups whose exclusion can be deemed profitable.

As this Court noted in *Katzenbach* v. *McClung,* 379 U. S. 294, 301:

> "racial discrimination was not merely a state or regional problem but was one of nationwide scope."

I

Unquestionably "housing is a necessary of life." (*Block* v. *Hirsch,* 256 U. S. 135, 156.)

As such, housing and its concomitant "homes" are among those primary human and civil rights to "life, liberty and the pursuit of happiness" which the constitutional and statutory structure of American government commands must be equal among all citizens regardless of race, creed and color. (*Shelley* v. *Kraemer,* 334 U. S. 1, 10.)

The issue here is not one of private concern. It is not personal or social. The plaintiff is a representative Negro citizen living under a Constitution which is color blind. The defendants, using the laws and services of the State of Missouri, are developing and controlling lots and homes for a vast community of 2700 families, the equivalent of a municipality of over 10,000 persons. For no personal or social reason of their own, but in order to profit from racism, they have openly decreed that their community shall be exploited for whites only. Negro citizens, no matter how cultured and financially qualified, will be fenced out.

What was said by Mr. Justice Douglas in *Bell* v. *Maryland,* 378 U. S. 226, as to the corporate owner of a restaurant racially conducted applies *a fortiori* to Mr. Mayer's corporate owners of this community (p. 245):

> "The corporation that owns this restaurant did not refuse service to these Negroes because 'it' did not like Negroes. The reason 'it' refused service was because 'it' thought 'it' could make more money by running a segregated restaurant."

In *Clover Hill Swimming Club* v. *Goldsboro,* 47 N.J. 25 (219 Atl. 2d 161), the defendant "Club" was a privately owned corporation operated for the profit of its stockholders. It advertised itself as a development on a 170 acre site of "a private family club with complete recreational facilities, lake swimming, tennis, skating and golfing," and limited to 400 family members. Dr. Goldsboro and wife (Negroes) duly applied for membership. The Supreme Court of New Jersey affirmed an order directing their admission because by the development's nature it was "a place of public accommodation" under the New Jersey Civil Rights Law. In refuting the claim that the defendant Club was within the exemption of private or social organizations, the Court made the following statement highly pertinent here (p. 166):

> "In other words, Clover Hill originated not because certain residents of Passaic Township wished to associate themselves in a swimming club, but rather because an entrepreneur was seeking a profitable investment."

Here the defendants' development and resultant quasi-municipality are in no sense a merely private investment of private concern only. Paddock Woods as a community is offered to the public for profit from the public. The defendants themselves and the public services which they offer and require have clothed it with public interest. Public interest and public government (state and federal) of necessity have an essential and inescapable relation, right and duty as regards Paddock Woods as a community in many ways detailed factually in paragraphs 7 and 8 of the complaint.

As this Court said in *Evans* v. *Newton,* 382 U. S. 296, 299:

> "A town may be privately owned and managed, but that does not necessarily allow the company to treat it as if it were wholly in the private sector."

In *Marsh* v. *Alabama,* 326 U. S. 501, the Gulf Shipping Corporation had established a similar community of residences, streets, sewers, etc., known as Chickasaw. The town's management forbade the distribution of religious literature. Notwithstanding that the property was privately owned by the Corporation, this Court held (p. 505) "the corporation's property interests" did not "settle the question", and that the prohibition violated the freedom of religion and press guaranteed by the First and Fourteenth Amendments. This Court said (the language being recently repeated in *Lombard* v. *Louisiana,* 373 U. S. 267, 275) (p. 506):

> "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."

Concurring, Mr. Justice Frankfurter said (p. 511):

> "Title to property as defined by State law controls property relations; it cannot control issues of civil liberties which arise precisely because a company town is a town as well as a congeries of property relations."

If these principles are true for the freedoms of religion and the press as civil rights, they are equally true for the equal protection of the laws and equality in citizenship as civil rights.

Pertinent also is the following from *Munn* v. *Illinois*, 94 U. S. 113, 126:

> "Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large."

Where an entrepreneur seeks to profit by creating, advertising and operating a privately owned segregated municipality of 2700 families with its management controlled by himself, he cannot demand of the law that it be deemed an exclave exempt from the law of the land applicable to any other organized municipality. He has taken upon himself powers akin to those of the State and municipal in nature; and he cannot be permitted to exercise them for racial discrimination. (*Marsh* v. *Alabama*, 326 U. S. 501, 505, 509.)

The consequences of the decisions below can be devastating to the unity, peace and even survival of our nation.

If Mr. Mayer has indeed successfully found a lawful loophole for profiting in the sale of racism as regards Negro citizens, he and other seekers after profit can do likewise as regards citizens of other national origins (Puerto Rican, Jewish, Italian, etc.), or as regards religious groups of citizens (such as Jehovah's Witnesses, Muslims, etc.), deemed by them likely to depress values.

Through such a loophole all the evils and dangers of racial and religious discrimination against which our Constitution and Civil Rights Laws are designed to immunize our nation and its people, can be brought flooding back until they become a roaring torrent. The vast suburbia

around our cities can be converted into sanctuaries for racial or religious monopolies and bigotries and into means of fencing into our cities those who are thus reduced to second or third class citizenship and to restricted privileges in the opportunities and dignities of American life.

Apartheid would be effectively introduced and given immunity. Racism would be advertisable and salable.

"There is no legally protected interest in segregation." (*Wanner* v. *County School Board,* 357 F.2d 452, 454.)

II

In our view a finding of state action, although abundantly and necessarily present here, is not necessary to this cause of action.

The action of the defendants themselves in creating and operating this vast quasi-municipality, the equivalent, with their adjoining like development, of a small city of 2700 families (over 10,000 people), has made it and them subject to the same laws of the land as are applicable to any organized municipality. (*Marsh* v. *Alabama,* 326 U. S. 501, 505, 507, 511; *Evans* v. *Newton,* 382 U. S. 296, 299.)

Section 19 of the Constitution of the State of Missouri provides:

> "Any city having more than 10,000 inhabitants may frame and adopt a charter for its own government, consistent with and subject to the constitution and laws of the state, in the following manner:"

The defendants cannot for their own profit excise a large segment of Missouri from the Constitution and laws of the United States by soliciting the public to colonize it on the basis of racial discrimination.

The complaint expressly alleges (par. 8):

> "Defendants Alfred H. Mayer Company, Alfred Realty Company and Alfred H. Mayer have prepared or shall prepare a deed embodying certain restrictions on the use of the property sold to individual buyers in said subdivision and on that land which is common to all residents and have the same recorded along with the deeds delivered to those buying homes, and an association of the residents will be formed which will have the power to enforce these restrictions against owners of homes within the subdivision, through judicial recourse if necessary, which power is the equivalent of the power to design and enforce zoning ordinances and the power to function as municipal government generally. Community facilities and services will be provided and performed under the direction of a Board of Trustees appointed by Defendant Alfred H. Mayer, which will be granted the power to levy assessments, and to collect these assessments through judicial action in case of default, including the establishment of liens on properties located in said subdivision and to make contracts for the performances of the services for the benefit of Paddock Woods residents, which powers are equivalent to the function of a municipal government."

Can it be doubted that if this Board of Trustees adopted a resolution, or perhaps more accurately an ordinance, to the effect that lots and houses must not be sold to Negroes or to persons of other specified national origin, or to persons of particular religious beliefs, such action would be

just as violative of constitutional and statutory civil rights as would like action by a Village Board of Trustees or Town Council? The fact that in this case the action is the "general policy" of the defendants for this quasi-municipality confers no exemption. As said in *Terry* v. *Adams,* 345 U. S. 461, 480: "An old pattern in new guise is revealed by the record."

In his concurring opinion in *Lombard* v. *Louisiana,* 373 U. S. 267, Mr. Justice Douglas, discussing whether a private restaurant was immune from constitutional restrictions on racial discriminations, quoted (p. 275) as follows from *German Alliance Ins. Co.* v. *Kansas,* 233 U. S. 389, 408:

> "It is the business that is the fundamental thing; property is but its instrument, the means of rendering the service which has become of public interest."

III

The basic error in the decision below, as we see it, is in its underlying assumption that to be actionable there must be "state action" which is something overt, direct or primary by the state itself.

The decisive sentence in the opinion of the Court of Appeals seems to be that the plaintiffs' case "relies on state inaction, rather than state action," and "relies upon state assistance which is non-discriminatory in itself" (379 F. 2d 33, 44). In other words, "state assistance" is conceded by the Court, but is regarded as neutral in what is assisted.

Our position, on the other hand, is that where the state assists with its services, requirements and laws an organization and community of people such as is alleged here, it necessarily assists all that is an integral part of it. A *fortiori* is this true where what is so assisted could not come into existence or be operable except with such assistance and in accord with state responsibilities and authorizations for it.

Jim Crowism is alien to American municipalities whether operated directly by the State or operated privately with the assistance of the State.

According to the facts pleaded, "it is defendants' 'general policy' not to sell said houses and lots to Negroes" (par. 6). Such a "general policy" is not merely coincidental. It is openly declared, and is central and determinative of the whole character and commercial identification of the development. In servicing, supervising and protecting the development governmentally, the State and its agencies are themselves accessory both in fact and in law to this built-in racial discrimination for this vast community into which the defendants are for their own profit soliciting the public with an assurance of Negro exclusion.

The rights here involved are in no sense merely personal or "social." There is no resemblance to the unquestioned right of an individual to choose his friends, associates or neighbors. There is no resemblance to a merely social club, with members having common acquaintance or common interest. An individual's constitutional right of association is in no way involved.

The "general policy" here involved is that of the entrepreneur Mayer as a community creator, salesman and private legislator. It is deemed by him to be essential to the success and profits of his investment. Through his corporations he enacts and imposes it as the local law for his planned communities, irrespective of public law and policy. Mr. Mayer could equally determine to allow no citizens of Puerto Rican, Italian or Jewish origin, etc. He and his Missouri corporations and not the United States Constitution will determine the criteria and privileges of eligibility and citizenship in his subdivisions of the State of Missouri.

Yet, obviously, Mr. Mayer could not create or operate his communities without (as the complaint alleges) state licenses and licensees, state fire, police, sewage and highway department services and regulations, state courts to enforce his contractual structurings, state zoning and building codes and agencies, state education for the children of his 2700 families, electric, telephone and water services by state licensed and supervised public utilities, state rights and immunities conferred by Missouri's corporation laws, financing by a state incorporated and regulated mortgage corporation, etc. See paragraphs 7 and 8 of the complaint.

The complaint specifically alleges (par. 7):

> "(1) The Building Commissioner of St. Louis County must approve the plans of Defendants and cooperate with Defendants in order to accomplish the building of homes in said subdivision.
>
> "(2) The Metropolitan St. Louis Sewer District has furnished and will furnish sewer services to the said subdivision.

"(3) The Planning Commission of St. Louis County and the St. Louis County Council are responsible for the zoning of the land in said subdivision and the enactment of an overall plan for use of land which will assure that this subdivision will retain its value as a successful residential area."

The Appendix to this brief sets forth certain pertinent Missouri statutes showing the direct participation of the State of Missouri and its agencies in the viability of this Mayer town.

IV

In terms of constitutional and statutory civil rights, "state action" need not be exclusive, direct or explicit, or be itself inspired by discrimination.

As said in *United States* v. *Guest,* 383 U. S. 745, 755:

"This is not to say, however, that the involvement of the State need be either exclusive or direct. In a variety of situations the Court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation of the State was peripheral, or its action was only one of several co-operative forces leading to the constitutional violation. See, e.g., *Shelley* v. *Kraemer,* 334 U. S. 1; *Pennsylvania* v. *Board of Trusts,* 353 U. S. 230; *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715; *Peterson* v. *City of Greenville,* 373 U. S. 244; *Lombard* v. *Louisiana,* 373 U. S. 267; *Griffin* v. *Maryland,* 378 U. S. 130; *Robinson* v. *Florida,* 378 U. S. 153; *Evans* v. *Newton, supra,* 382 U. S. 296."

In *Evans* v. *Newton,* 382 U. S. 296, this Court said (pp. 299, 301):

> "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action. * * *
>
> "This conclusion is buttressed by the nature of the service rendered the community by a park. The service rendered even by a private park of this character is municipal in nature. It is open to every white person, there being no selective element other than race."

In *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715, a publicly-owned and operated automobile parking building leased a portion of the premises to a private operator of a restaurant which refused service to the plaintiff because he was a Negro. The Supreme Court of Delaware held that the lessee was acting in "a purely private capacity" and hence that his refusal was not state action within the Fourteenth Amendment. In discussing this case in *Reitman* v. *Mulkey,* 387 U. S. 369, this Court conceded that "the State neither commanded nor expressly authorized or encouraged the discriminations" (p. 380). Nevertheless, in the *Burton* case this Court reversed, because (p. 724):

> "the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn. It is irony amounting to grave injustice that in one part of a single building, erected and maintained with public funds by an agency of the State to

> serve a public purpose, all persons have equal rights, while in another portion, also serving the public, a Negro is a second-class citizen, offensive because of his race, without rights and unentitled to service, but at the same time fully enjoys equal access to nearby restaurants in wholly privately owned buildings."

In *Smith* v. *Holiday Inns of America, Inc.*, 336 F. 2d 630 (1964), the Court of Appeals for the Sixth Circuit followed this *Burton* decision, notwithstanding that the defendant private corporation held in fee and not by lease and the motel was located in a privately owned urban development project. The Court enjoined the defendant from denying to Negroes "the right to purchase and enjoy all accommodations offered at the Holiday Inn-Capitol Hill" (p. 631). The Court said (pp. 634, 635):

> "The single pervasive fact which defendants seek to ignore but which this court cannot is that this motel is part and parcel of a large, significant, and continuing public enterprise—the Capitol Hill Redevelopment Project. This motel was conceived by the planners of this project, its creation was made possible by the execution of the project, and its existence is now governed to a great degree by the project's predetermined design and controls. * * * But in both Burton and the instant case, the basic plan, the financing, the land acquisition, the execution of the plan, the continuing supervision of the plan are all state actions under state law and through state agencies. Under these circumstances we do not believe that the distinction between sale and lease is a crucial one."

In *Wimbish* v. *Pinellas County, Florida,* 342 F 2d 804 (1965) Fifth Circuit, three Negroes successfully brought an injunction suit against a privately operated golf course from which they were excluded because of race. The golf

course was leased from Pinellas County for use only as a golf course; but the County had to approve the tenant's plans for improvements; prices charged for golf fees were subject to approval by the County; and the tenant's books were subject to inspection by the County for calculating the rental. The Court conceded "that the County had no purpose of discrimination in the execution of the lease." Nevertheless (p. 806):

> "It does not follow, however, that the County is any less involved in the operation of the golf course because its reasons for the lease provisions are good faith ones. Although the execution of the lease was not for the purpose of promoting discrimination, 'it is of no consolation to an individual denied the equal protection of the laws that it was done in good faith. Certainly the conclusions drawn in similar cases by the various Courts of Appeals do not depend upon such a distinction.' *Burton* v. *Wilmington Parking Authority*, 1961, 365 U. S. 715, 725, 81 S. Ct. 856, 861 (Footnote omitted.)"

In *Ethridge* v. *Rhodes*, 268 F. Supp. 83 (May, 1967), the District Court in Ohio sustained a complaint by Negro plaintiffs asking an injunction to prevent the State of Ohio from entering into construction contracts because the contractors were using only union hiring sources and some union officials prevented Negroes from obtaining union membership. The court conceded that the State had no intent to discriminate (p. 87):

> "However, when a state has become a joint participant in a pattern of racially discriminatory conduct by placing itself in a position of interdependence with private individuals acting in such a manner—that is, the proposed contractors acting under contract with unions that bar Negroes—this constitutes a type of

'state action' proscribed by the Fourteenth Amendment. *Burton* v. *Wilmington Parking Authority, supra.* Thus, as in the instant suit, where a state through its elected and appointed officials, undertakes to perform essential governmental functions—herein, the construction of facilities for public education—with the aid of private persons, it cannot avoid the responsibilities imposed on it by the Fourteenth Amendment by merely ignoring or failing to perform them. Ibid."

In *Reitman* v. *Mulkey,* 387 U. S. 369 (May, 1967), this Court upheld the Supreme Court of California in holding violative of the Equal Protection Clause the amendment to the State's Constitution, adopted by referendum, which decreed that the State should not deny to anyone the right to sell or not to sell real property to such persons "as he, in his absolute discretion, chooses." This Court (p. 376) enumerated as one of its reasons that the amendment "would encourage and significantly involve the State in private racial discrimination contrary to the Fourteenth Amendment." This decision is the more pertinent because the four dissenters held (p. 389) that California had merely "decided to remain neutral."

Respectfully submitted,

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